

IN THE SUPREME COURT OF THE STATE OF MONTANA

FILED

March 26 2010

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

No. DA 09-0516

---

STATE OF MONTANA,

Plaintiff and Appellee,

v.

NIEL KELLY MULLARKEY,

Defendant and Appellant.

---

**BRIEF OF APPELLANT**

---

On Appeal from the Montana First Judicial District Court,  
Lewis and Clark County, The Honorable Kathy Seeley, Presiding

---

APPEARANCES:

ELI M. PARKER  
Office of the State Public Defender  
610 N. Woody Street  
Missoula, Montana 59802-4143

ATTORNEY FOR DEFENDANT  
AND APPELLANT

STEVE BULLOCK  
Montana Attorney General  
MARK MATTIOLI  
Assistant Attorney General  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401

LEO J. GALLAGHER  
Lewis and Clark County Attorney  
228 Broadway-Courthouse  
Helena, MT 59601

ATTORNEYS FOR PLAINTIFF  
AND APPELLEE

## **TABLE OF CONTENTS**

|  |     |
|--|-----|
| TABLE OF AUTHORITIES .....   | iii |
| STATEMENT OF THE ISSUES .....  | 1   |
| STATEMENT OF THE FACTS AND CASE.....   | 1   |
| STANDARD OF REVIEW .....   | 10  |
| SUMMARY OF THE ARGUMENT .....  | 11  |
| ARGUMENT .....   | 12  |
| I. THE DISTRICT COURT’S DISREGARD FOR PROCEDURAL<br>REQUIREMENTS IN DETERMINING FITNESS TO PROCEED<br>VIOLATED MULLARKEY’S FUNDAMENTAL RIGHTS TO<br>DUE PROCESS, DIVESTED THE DISTRICT COURT OF<br>JURISDICTION, AND REQUIRES DISMISSAL..... | 12  |
| II. THE DISTRICT COURT IMPROPERLY DENIED<br>MULLARKEY’S MOTION TO DISMISS.....   | 23  |
| III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT<br>DETERMINED THAT MULLARKEY WAS FIT TO PROCEED<br>AND, THEREFORE, THIS COURT MUST DISMISS THE<br>CHARGES AGAINST MULLARKEY UNDER MONT. CODE<br>ANN. § 46-14-221(3)(a).....            | 25  |
| IV. THE DISTRICT COURT FAILED ITS DUTY TO EVALUATE<br>MULLARKEY’S FITNESS FOR PENAL PUNISHMENT AND,<br>THEREFORE, THIS COURT MUST REMAND FOR RE-<br>SENTENCING .....   | 29  |

## **TABLE OF CONTENTS (Cont.)**

|                                 |    |
|---------------------------------|----|
| CONCLUSION .....                | 32 |
| CERTIFICATE OF SERVICE .....    | 34 |
| CERTIFICATE OF COMPLIANCE ..... | 35 |
| APPENDIX .....                  | 36 |

## **TABLE OF AUTHORITIES**

### **CASES**

|   |                |
|---|----------------|
| Curtis v. Dist. Court of 21st Jud. Dist.,<br>266 Mont. 231, 879 P.2d 1164 (1994)..... | 14, 28         |
| Dusky v. United States,<br>362 U.S. 402 (1960).....                                   | 26             |
| In re Mental Health of E.T.,<br>2008 MT 299, 345 Mont. 497, 191 P.3d 470.....         | 10             |
| Jackson v. Indiana,<br>406 U.S. 715 (1972).....                                       | 12, 13, 24     |
| McCormick v. Andres,<br>2008 MT 182, 343 Mont. 424, 185 P.3d 973.....                 | 10             |
| Morrissey v. Brewer,<br>408 U.S. 471 (1972).....                                      | 19, 23         |
| State v. Austad,<br>197 Mont. 70, 641 P.2d 1373 (1981).....                           | 26             |
| State v. Bartlett,<br>271 Mont. 429, 898 P.2d 98 (1995).....                          | 29             |
| State v. Cowan,<br>260 Mont. 510, 861 P.2d 884 (1993).....                            | 12             |
| State v. Finley,<br>2003 MT 239, 317 Mont. 268, 77 P.3d 193.....                      | 17, 19, 22     |
| State v. Giddings,<br>2001 MT 76, 305 Mont. 74, 29 P.3d 475.....                      | 17, 18, 19, 22 |
| State v. Giddings,<br>2009 MT 61, 349 Mont. 347, 208 P.3d 363.....                    | 10             |

## **TABLE OF AUTHORITIES (Cont.)**

|   |                |
|---|----------------|
| State v. Hall,<br>203 Mont. 528, 662 P.2d 1306 (1983).....      | 26             |
| State v. Korell,<br>213 Mont. 316, 690 P.2d 992 (1984).....     | 30, 31         |
| State v. Meeks,<br>2002 MT 246, 312 Mont. 126, 58 P.3d 167..... | 15, 16         |
| State v. Oppelt,<br>184 Mont. 48, 601 P.2d 394 (1979).....      | 19             |
| State v. Statczar,<br>228 Mont. 446, 743 P.2d 606 (1987).....   | 10, 25, 26, 27 |
| State v. Tison,<br>2003 MT 342, 318 Mont. 465, 81 P.3d 471..... | passim         |
| State v. Walker,<br>2009 Mont. Dist. LEXIS 525 .....            | 18, 19, 22     |

## **OTHER AUTHORITY**

### **Montana Code Annotated**

|                          |                |
|--------------------------|----------------|
| § 45-5-210(1)(b) .....   | 2              |
| § 45-7-302 .....         | 2              |
| § 46-14-103 .....        | 26             |
| § 46-14-103 (2009) ..... | 26             |
| § 46-14-202 .....        | passim         |
| § 46-14-202 (2009) ..... | 13             |
| § 46-14-202(2) .....     | 7, 14, 23, 24  |
| § 46-14-206 .....        | 15             |
| § 46-14-206(1)(c) .....  | 20, 22         |
| § 46-14-221 .....        | passim         |
| § 46-14-221(1) .....     | 15, 20, 21, 22 |
| § 46-14-221(2) .....     | 13, 14, 15, 22 |

## **TABLE OF AUTHORITIES (Cont.)**

### **Montana Code Annotated (Cont.)**

|                               |        |
|-------------------------------|--------|
| § 46-14-221(2)(a).....        | 15     |
| § 46-14-221(2)(b) (2009)..... | 13     |
| § 46-14-221(2)(c).....        | 15     |
| § 46-14-221(3)(a).....        | passim |
| § 46-14-311.....              | 30, 31 |
| § 46-14-311(1).....           | 30     |
| § 46-14-311(1) (2009) .....   | 30     |
| § 46-14-311(2).....           | 30, 32 |
| § 46-14-312(2).....           | 30     |
| § 46-23-1012(2).....          | 18     |
| § 46-23-1012(4) (1999) .....  | 18     |

## **STATEMENT OF THE ISSUES**

1. Whether the district court violated Montana's commitment procedures by ordering the Appellant transferred to the Montana State Hospital for one-hundred, three days without first obtaining the statutorily required report of examination, determining a longer period was necessary, or first determining the defendant's fitness to proceed.

2. Whether the district court improperly denied Appellant's motion to dismiss after the district court held Appellant at Montana State Hospital beyond the statutory maximum time limit.

3. Whether an abuse of discretion occurred when the district court disregarded the opinions of two qualified mental health experts to determine a diagnosed paranoid schizophrenic in complete denial of his mental illness was fit to proceed.

4. Whether the district court failed its duty at sentencing to independently analyze the Appellant's diagnosed paranoid schizophrenia and determine the Appellant's fitness for penal punishment.

## **STATEMENT OF THE FACTS AND CASE**

On March 22, 2008, Helena police officers approached Niel Kelly Mullarkey (Mullarkey) where he lay in the bed of his truck. Mullarkey had parked his truck overnight in the parking lot of a convenience store where he was involved

in an altercation on the previous day. After requesting Mullarkey exit the vehicle, an officer opened the tailgate to Mullarkey's truck. At that moment, the officers saw a knife in Mullarkey's hand. Two officers drew tazer guns, pointed their weapons at Mullarkey, ordered him to drop the knife, and immediately fired their weapons. A third officer pointed his revolver at Mullarkey. According to witnesses in the convenience store, Mullarkey held the knife in his lap with the blade angled up and away from the officers. He did not point or wave the knife in a threatening manner. (Trial Tr. at 190:23-25; 191:1-11; 194:2-23; 207:16-25.) Nevertheless, the officers repeatedly tazed Mullarkey, dragged him from the truck, wrestled him to the ground on the concrete, and placed him in handcuffs and leg restraints. The officers continued to taze Mullarkey while he was on the ground.

On April 8, 2008, the Lewis and Clark County Attorney (State) filed an Information in district court charging Mullarkey with misdemeanor obstructing a peace officer in violation of Mont. Code Ann. § 45-7-302, and three counts of felony assault on a peace officer in violation of Mont. Code Ann. § 45-5-210(1)(b). The State alleged Mullarkey purposely or knowingly caused reasonable apprehension of serious bodily injury in each of the three Helena police officers by brandishing a knife. (D.C. Doc. 3 at 2.)

Upon arrest, Mullarkey refused to be photographed or allow his tazer wounds to be examined. Friends and family informed the detention center that



Mullarkey suffered psychological problems, particularly after the death of his wife by suicide in 2001. When learning his attorney requested a mental health evaluation, Mullarkey went on a hunger strike and refused to communicate with detention center staff. He was eventually admitted to the Montana State Hospital (MSH) on Emergency Detention status from June 6, 2008 to June 9, 2008.

Mullarkey's original attorney reported difficulty working with Mullarkey as a result of extremely rigid and inflexible decision making, and requested a psychological evaluation. On June 13, 2008, Dr. Gregg, Ph.D. psychologically evaluated Mullarkey. Mullarkey refused to fully cooperate in the evaluation. Consequently, Dr. Gregg indicated he lacked sufficient information to form an opinion with respect to Mullarkey's fitness to stand trial. Accordingly, Dr. Gregg recommended that Mullarkey undergo additional evaluation at MSH to clarify the issue of his competency. (D.C. Doc. 61 at 1-2; Appellant's Ex. A.)

On July 25, 2008, the district court ordered that Mullarkey undergo a competency evaluation at MSH. (Appellant's Ex. A at 2.) A competency evaluation is provided by Mont. Code Ann. § 46-14-202. Confusingly, the district court's "Order For Competency Evaluation" was, on its face, pursuant to § 46-14-221. But § 46-14-221, is Montana's statute providing for commitment of a criminal defendant, not just a competency evaluation. The district court's order stated as follows: "Upon appropriate Motion pursuant to Section 46-14-221,

MCA, and good cause appearing: IT IS HEREBY ORDERED that the Defendant shall undergo a competency evaluation pursuant to Section 46-14-221, MCA, at the Warm Springs State Hospital.” (D.C. Doc. 22 at 1; Appellant’s Ex. B.)

The district court had not satisfied the procedural requirements of commitment under Mont. Code Ann. § 46-14-221. Dr. Gregg had not provided the district court an opinion regarding Mullarkey’s fitness to stand trial. Additionally, the district court made no finding that Mullarkey was unfit to proceed. (Appellant’s Ex. A at 2.)

Nevertheless, MSH proceeded under § 46-14-221 to hold Mullarkey in its custody beyond the time frame for a mere competency evaluation. Additionally, MSH developed an individualized treatment plan to assist Mullarkey in regaining his fitness to proceed. (D.C. Doc. 36 at 2, 3:2; Appellant’s Ex. C.) Despite its best efforts, MSH was unable to rehabilitate Mullarkey’s fitness.

On October 7, 2008, John Van Hassel, a Ph.D. psychologist, and Virginia Hill, M.D. a psychiatrist, issued their report to the district court. Dr. Van Hassel and Dr. Hill diagnosed Mullarkey as suffering from a severe mental disorder, paranoid schizophrenia. Consequently, both doctors determined that Mullarkey was unfit to proceed because he was unable to adequately understand the charges against him and unable to participate meaningfully in his own defense. (Appellant’s Ex. A at 2.) The competency evaluation specifically indicated that

Mullarkey was in complete denial of his mental illness, which was consistent with his diagnosis as a paranoid schizophrenic. Dr. Hill indicated that Mullarkey's paranoid thoughts preclude him from recognizing that he has a mental illness. Throughout his sixty-five days of treatment at MSH, Mullarkey's condition remained static with no signs of improvement. (Appellant's Ex. C at 4:8.)

On October 23, 2008, the State advised the district court that Mullarkey was unfit to proceed. The district court then scheduled a hearing to review Mullarkey's fitness to proceed. The district court scheduled this after the time frame for commitment under Mont. Code Ann. § 46-14-221, had expired. Additionally, the district court's review of Mullarkey's fitness to proceed was scheduled long after the time frame for a competency evaluation had expired under § 46-14-202. At no time did the district court render a determination that a longer period would be necessary to accomplish either the purpose of Mullarkey's competency evaluation or commitment to render him fit to stand trial.

The district court's hearing to review Mullarkey's fitness to proceed was held on November 5, 2008, one-hundred, three days after the district court committed Mullarkey to MSH for the purpose of competency evaluation. The district court received testimonial evidence from Dr. Hill that Mullarkey was unfit to proceed. Furthermore, Dr. Hill indicated that Mullarkey was not likely to regain fitness in the reasonably foreseeable future and that Mullarkey's only hope of

regaining competency would be a court order authorizing involuntary medication. Additionally, the district court was presented Dr. Gregg's evaluation of Mullarkey. Finally, Mullarkey testified that he was fit to proceed and wished to stand trial.

At the hearing, Dr. Hill also explained how Mullarkey's paranoid schizophrenia would likely preclude any meaningful ability to assist in his own defense. Although intelligent and possessed of a general understanding of legal proceedings, Mullarkey's rigidity of thought and paranoia rendered him unfit to consult adequately with counsel with a reasonable degree of rational and factual understanding. Dr. Hill testified that Mullarkey is very rigid in his thinking and inflexible in his decision making. She expressed concern that Mullarkey would be unable to manage the presentation of his case in court or cooperate with his attorney. (D.C. Doc. 37 at 4:12; Appellant's Ex. D.)

Following Mullarkey's competency hearing, the district court ordered both parties to prepare proposed findings of facts and conclusions of law. The State's proposed findings of fact stated that Mullarkey was unfit to proceed. Additionally, the State conceded that Mullarkey was unlikely to regain fitness in the reasonably foreseeable future under the treatment plan already provided by MSH. Accordingly, the State requested the district court authorize MSH to administer involuntary medication to Mullarkey. (Appellant's Ex. C at 2:1, 7:5.)

On November 17, 2008, the district court issued its findings of fact, conclusions of law and order on Mullarkey's fitness to proceed. The court acknowledged that it had never issued an order finding that Mullarkey lacked fitness to proceed. Contrary to the MSH evaluation, the district court determined that Mullarkey was fit to proceed. In support of this determination, the district court relied upon Mullarkey's testimony at the review hearing to find that Mullarkey was of at least average intelligence, aware of the seriousness of the charges against him, that he possessed an adequate understanding of the court proceedings, and that he wished to stand trial. The district court did not discuss whether these findings addressed Dr. Hill's opinion that Mullarkey's mental illness precluded his ability to assist with his defense and consult with his attorney with a reasonable degree of rational and factual understanding. (Appellant's Ex. D at 3:12, 4:13-14.) Instead, the district court adopted Mullarkey's opinion that he was fit to stand trial and capable of assisting in his own defense. (Appellant's Ex. D at 4:15, 5:16-17, 5:1-2.)

Prior to trial, Mullarkey's defense counsel filed a motion to dismiss. (D.C. Doc. 53.) Defense counsel moved the district court to dismiss the State's action against Mullarkey with prejudice based on violations of his fundamental right to due process and Mont. Code Ann. § 46-14-202(2). The defendant's brief in support argued that Mullarkey's incarceration at MSH exceeded the statutory

maximum period of sixty days for competency evaluation. (D.C. Doc. 54.) In fact, a period of one-hundred, three days transpired between the court's commitment of Mullarkey to MSH for the purpose of a competency evaluation on July 25, 2008 and the district court's review of Mullarkey's fitness to proceed on November 5, 2008. Accordingly, counsel argued that Mullarkey's incarceration violated his fundamental right to due process and the procedural requirements of Mont. Code Ann. § 46-14-202(2). Therefore, the district court was compelled to dismiss the State's action with prejudice.

The State's Response noted that Mullarkey's attorney petitioned the district court for a competency evaluation under § 46-14-221, which allows for a ninety-day commitment. The State argued that Mullarkey's non-compliance with treatment at MSH rendered Mullarkey's commitment in excess of sixty days reasonable and necessary. Additionally, the State pointed out that Mullarkey failed to raise a due process objection prior to filing his motion to dismiss. (D.C. Doc. 56.)

The district court denied Mullarkey's motion to dismiss by distinguishing the authority relied upon in the defendant's brief from the facts of Mullarkey's incarceration at MSH. (Appellant's Ex. A.) Mullarkey's brief relied upon *State v. Tison*, which determined that violation of § 46-14-221 results in a due process violation where the procedural requirements of that statute are not followed. (D.C.

Doc. 54.) The district court noted that Mont. Code Ann. § 46-14-221, requires a defendant be determined unfit to proceed prior to commitment. Because the District court never found Mullarkey unfit to proceed, the district court determined that *State v. Tison* provided no authority for Mullarkey's motion to dismiss. (Appellant's Ex. A at 4.) Consequently, the district court denied Mullarkey's motion to dismiss.

Following Mullarkey's conviction at trial, the district court ordered a pre-sentence report and scheduled a sentencing hearing. The district court did not direct the pre-sentence investigator to examine the effect of Mullarkey's paranoid schizophrenia on the commission of his offenses. Specifically, the pre-sentence report did not include an opinion by a person appointed through the department of public health and human services as to whether Mullarkey's diagnosed paranoid schizophrenia rendered him unable to appreciate the criminality of his behavior or to conform his behavior to the requirements of the law at the time of the commission of his offenses. (D.C. Doc. 83.) Additionally, the district court failed to make any record-based analysis of whether Mullarkey's paranoid schizophrenia rendered him unable to appreciate the criminality of his behavior or to conform his behavior to the requirements of the law at the time he committed his offenses. The district court proceeded to sentence Mullarkey to the Department of Corrections.

## **STANDARD OF REVIEW**

A due process claim presents a question of constitutional law over which this Court exercises plenary review. *In re Mental Health of E.T.*, 2008 MT 299, ¶ 7, 345 Mont. 497, 191 P.3d 470. This matter also presents a question of statutory interpretation. Questions of law and statutory interpretation are reviewed for correctness. *State v. Tison*, 2003 MT 342, ¶ 5, 318 Mont. 465, 81 P.3d 471.

The district court denied Appellant's motion to dismiss the State's charges against him. A district court's grant or denial of a motion to dismiss in a criminal case presents a question of law that this Court reviews *de novo*. *State v. Giddings (Giddings II)*, 2009 MT 61, ¶ 42, 349 Mont. 347, 208 P.3d 363.

The district court determined Mullarkey was fit to proceed. This Court reviews a district court's discretionary rulings, including a determination of fitness to proceed, for an abuse of discretion. *State v. Statczar*, 228 Mont. 446, 456, 743 P.2d 606, 613 (1987). A district court abuses its discretion when it acts arbitrarily without employment of conscientious judgment or so exceeds the bounds of reason as to work a substantial injustice. *McCormick v. Andres*, 2008 MT 182, ¶ 22, 343 Mont. 424, 185 P.3d 973.

The district court had a duty to review Mullarkey's mental illness in the context of sentencing. This Court reviews a district court's compliance with Montana statute for correctness. *Tison*, ¶ 5.



## **SUMMARY OF THE ARGUMENT**

The district court's disregard for commitment procedures under Montana law violated Mullarkey's constitutional due process guarantees. Additionally, the district court's failure to comply with the requirements of Montana's commitment procedures divested the court of jurisdiction over the State's charges against Mullarkey. Accordingly, the district court improperly denied Mullarkey's motion to dismiss the State's charges against him. Furthermore, the district court's determination that Mullarkey was fit to proceed constituted an abuse of discretion. A reasonable trier of fact could not rely upon the statements of a diagnosed paranoid schizophrenic to disregard a MSH determination that Mullarkey was unable to assist in his own defense. Finally, the district court failed to review Mullarkey's mental disease at sentencing and, thereby, failed its duty under Montana law.

The district court's violation of Mullarkey's constitutional due process rights, divestment of jurisdiction over the State's charges, and abuse of discretion each require this Court to dismiss the State's charges with prejudice. Even if the State's charges may not be dismissed, this Court must remand for re-sentencing because the district court failed its duty to analyze Mullarkey's mental illness at sentencing.

## **ARGUMENT**

Montana considers evidence of mental disease or defect at three phases of a criminal proceeding: (1) determination of fitness to stand trial; (2) at trial to disprove state of mind; and (3) at sentencing. *State v. Cowan*, 260 Mont. 510, 517, 861 P.2d 884, 889 (1993). This appeal presents issues regarding the district court's failure to render adequate review in the pretrial setting and at sentencing.

### **I. THE DISTRICT COURT'S DISREGARD FOR PROCEDURAL REQUIREMENTS IN DETERMINING FITNESS TO PROCEED VIOLATED MULLARKEY'S FUNDAMENTAL RIGHTS TO DUE PROCESS, DIVESTED THE DISTRICT COURT OF JURISDICTION, AND REQUIRES DISMISSAL.**

The district court's failure to comply with the requirements of Montana's commitment procedures divested the court of its jurisdiction and rendered the proceedings void *ab initio*. The district court's disregard for the procedural requirements of the determination of Mullarkey's fitness to proceed violated Mullarkey's fundamental and constitutional rights to due process. Consequently, this Court should reverse Mullarkey's sentence and dismiss with prejudice the State's charges against him.

The United States Supreme Court has determined that due process requires that a district court's commitment of a defendant follow the civil or criminal commitment procedures provided by state law. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). At a minimum, due process requires a rational relation between the

nature and duration of commitment and its purpose. *Jackson*, 406 U.S. at 738; *Tison*, ¶ 11. The requirements of commitment procedures under Montana statute are “clearly designed to prevent the abhorrent situation where a defendant languishes indefinitely in a mental hospital with criminal charges hanging over his head like the sword of Damocles.” *Tison*, ¶ 11.

In Montana, two statutes govern a district court’s pretrial determination of a criminal defendant’s fitness to proceed. Both statutes provide the district court authority to commit a defendant to MSH. The first statute requires the district court to appoint a psychiatrist or psychologist to produce an *examination*, or competency evaluation, of the defendant’s fitness. Mont. Code Ann. § 46-14-202 (2009). The second statute allows the district court to order a *commitment* to MSH to develop an individualized treatment plan to assist the defendant to gain fitness to proceed. Mont. Code Ann. § 46-14-221(2)(b) (2009).

Both statutes place specific time limitations on the district court’s determination of a criminal defendant’s fitness to proceed. These limitations constitute constitutional and statutory procedural protections for a criminal defendant whose fitness to stand trial is in question. *Jackson*, 406 U.S. at 738; *Tison*, ¶ 11.

The district court may order commitment for the purpose of *examination* without making a determination that the criminal defendant is unfit to proceed.

*See* Mont. Code Ann. § 46-14-202(2). But such a commitment may only last sixty-days. To extend beyond sixty-days, the district court must determine that a longer period is necessary to serve the purpose of examination. Where a commitment for the purpose of examination extends beyond sixty-days without a determination by the district court that a longer period is necessary, the district court has violated the procedural requirements of § 46-14-202. In the present case, the district court violated Mullarkey's constitutional due process guarantees and the procedural requirements of § 46-14-202, by committing Mullarkey to MSH for a period of one-hundred, three days.

For the purpose of *commitment* under § 46-14-221, the district court may commit the criminal defendant for a period that must not exceed ninety days. The district court must then review the criminal defendant's fitness to stand trial *within* that ninety-day period. Mont. Code Ann. § 46-14-221(3)(a). If the defendant has not regained fitness, the district court must dismiss the criminal proceeding. Mont. Code Ann. § 46-14-221(3)(a). The district court may only extend the defendant's period of commitment where specific evidence demonstrates that he "will become fit to proceed within the reasonably foreseeable future." Mont. Code Ann. § 46-14-221(3)(a). Accordingly, this Court requires strict compliance by the District court with the provisions of § 46-14-221(2). *Curtis v. Dist. Court of 21st Jud. Dist.*, 266 Mont. 231, 236, 879 P.2d 1164, 1167 (1994).

Under Mont. Code Ann. § 46-14-221, the district court must satisfy specific requirements under Montana statute before it commits a defendant to MSH. First, the district court must obtain a report of examination under § 46-14-206. *See State v. Meeks*, 2002 MT 246, ¶ 15, 312 Mont. 126, 58 P.3d 167. Second, the district court must determine that the defendant is unfit to proceed. Mont. Code Ann. § 46-14-221(2)(a).

Accordingly, a district court's *commitment* under § 46-14-221, violates the procedural requirements of that statute where (1) the period of commitment exceeds ninety days without review of the defendant's fitness to proceed, (2) the district court fails to determine the defendant is unfit to proceed before ordering the ninety-day commitment, or (3) the district court fails to obtain a report of examination that satisfied the requirements of § 46-14-206, before ordering commitment. *See* Mont. Code Ann. § 46-14-221(1), (2)(a), (3)(a). In the present case, the district court violated each of these procedural requirements of § 46-14-221.

In *Meeks*, this Court determined that the district court erred when it failed to dismiss the criminal charges against the defendant in accordance with Mont. Code Ann. § 46-14-221(2)(c).<sup>1</sup> *Meeks*, ¶ 26. Following evaluation by MSH, Meeks was

---

<sup>1</sup> The 2003 legislature moved this provision to Mont. Code Ann. § 46-14-221(3)(a), but the ninety-day limit remains the same as does the requirement of dismissal. *Tison*, ¶ 8.

determined unfit to proceed. The competency evaluation “described Meeks as paranoid, and concluded that Meeks was uncooperative and not able to assist his attorney with his own defense.” *Meeks*, ¶ 25. Additionally, the evaluation contained no specific evidence to suggest that Meeks would regain fitness to proceed in the reasonably foreseeable future. *Meeks*, ¶ 26. Consequently, the district court possessed no basis to continue criminal proceedings against Meeks and no jurisdiction to hold Meeks at MSH beyond ninety days. This Court determined that the district court erred when it failed to dismiss the criminal charges in accordance with Montana law. *Meeks*, ¶ 26; *see* Mont. Code Ann. § 46-14-221(3)(a).

In *Tison*, this Court determined that the district court had exceeded its jurisdiction when it committed Tison for a second ninety-day period at MSH once the first ninety-day statutory period expired. *Tison*, ¶¶ 11, 15. Additionally, the State lacked any power to proceed further with criminal charges against Tison once the ninety-day period had expired. MSH determined Tison was mentally ill and unfit to proceed. *Tison*, ¶ 15. The competency evaluation provided by MSH indicated Tison was unfit to proceed. Also, the competency evaluation provided no specific evidence that Tison was likely to regain fitness at any time in the reasonably foreseeable future. Nevertheless, the district court committed Tison to MSH for a second ninety-day period and, thereby, exceeded the statutory period

provided under Montana law. The district court's extension also violated Tison's constitutional due process rights. *Tison*, ¶ 11. Consequently, this Court reversed Tison's conviction and required the district court dismiss the criminal charges against him. *Tison*, ¶¶ 15-16.

In the context of either commitment procedure, the district court's violation of the procedural requirements of Montana law should result in dismissal of the criminal proceeding with prejudice. This Court has determined that violation of procedural requirements may constitute a jurisdictional error that voids a prior proceeding *ab initio* upon reversal. *State v. Finley*, 2003 MT 239, ¶ 13, 317 Mont. 268, 77 P.3d 193. Jurisdiction is the court's power to hear and determine an action, to make orders, and to render lawful judgments. *Finley*, ¶ 13. A district court's jurisdiction may be voided where the State or district court violates the procedural requirements of the action. Additionally, a district court's violation of the procedural requirements under Montana law constitutes a violation of the defendant's constitutional guarantees to due process, which requires dismissal of the action with prejudice. *Tison*, ¶ 11.

In *Giddings I*, this Court determined that the State's failure to comply with the procedural requirements of a probation revocation voided the District court's subject matter jurisdiction over the revocation proceeding. *State v. Giddings (Giddings I)*, 2001 MT 76, ¶ 19, 305 Mont. 74, 29 P.3d 475. In violation of

procedural requirements under Mont. Code Ann. § 46-23-1012(4) (1999), the State failed to hold a probable cause hearing within thirty-six hours of his arrest.

Consequently, this Court reversed Giddings's sentence and held that the District court lacked jurisdiction to hold the revocation hearing. *Giddings I*, ¶ 19.

In *Walker*, the Twenty-First Judicial District Court held that the State's violation of procedural requirements required dismissal of the State's petition to revoke. *State v. Walker*, 2009 Mont. Dist. LEXIS 525. Walker was arrested and charged with Partner Family Member Assault (PFMA) in violation of § 45-5-206. This arrest required the detention center to hold Walker without bail until he could appear before the justice of the peace. *Walker*, ¶ 23. Walker was also on probation. Accordingly, Walker's probation officer gave the arresting officer oral authorization to hold Walker on allegations of probation violation. *Walker*, ¶ 23. The probation officer then failed to provide within twelve hours of the *oral* authorization for Walker's arrest a *written* authorization to the detention center for Walker's incarceration. Accordingly, the district court determined that the State failed to comply with the procedural requirements of § 46-23-1012(2). Citing *Giddings I*, the district court held that the State's violation of procedural requirements divested the court of its jurisdiction to hold a revocation hearing. *Walker*, ¶ 25 (citing *Giddings I*, ¶ 19). Consequently, the district court dismissed the State's probation revocation proceeding with prejudice. *Walker*, ¶¶ 30-31.



A defendant facing criminal prosecution enjoys greater constitutional guarantees than a probationer facing revocation. *See Morissey v. Brewer*, 408 U.S. 471, 480 (1972); *State v. Oppelt*, 184 Mont. 48, 53, 601 P.2d 394, 397 (1979). Nevertheless, this Court has determined that a probationer has a right to hold the State accountable to the procedural requirements that vest jurisdiction in the district court. *See Giddings I*, ¶ 19, *Finley*, ¶ 13, *Walker*, ¶¶ 25, 29. Accordingly, a criminal defendant must possess the same or greater due process guarantee to hold the State accountable under the procedural requirements of Montana statute. *See Morissey*, 408 U.S. at 480; *Tison*, ¶ 11. Therefore, a criminal defendant committed to the MSH by the district court has a right to hold the State accountable to the requirements of the commitment procedures under Mont. Code Ann. §§ 46-14-202 and -221.

In the present case, the record is unclear whether the district court ordered Mullarkey placed in MSH pursuant to § 46-14-202 or § 46-14-221. Nevertheless, the record is clear that the district court violated the procedural requirements of both statutes. Mullarkey's constitutional due process guarantees provide him the right to hold the State accountable to the requirements of the commitment procedures under Montana law. The district court violated those procedures. Therefore, this Court should dismiss the State's charges against Mullarkey with prejudice.

Mullarkey's commitment was, in part, substantially consistent with Mont. Code Ann. § 46-14-221. The district court's order required that the sheriff transfer Mullarkey to MSH pursuant to § 46-14-221. (Appellant's Ex. A at 2.) Consistent with § 46-14-221, Dr. Hill and Dr. Van Hassel developed an individualized treatment plan to assist Mullarkey in regaining fitness to proceed. (Appellant's Ex. C at 2.) Although exceeding the sixty-day period allotted to a commitment for the purpose of a competency evaluation, MSH prepared its evaluation within the ninety-day period of a commitment to regain fitness under § 46-14-221(3)(a). On November 5, 2008, the district court conducted the fitness review required under § 46-14-221, although not *within* the ninety-day period provided by that statute. Accordingly, this Court may determine that Mullarkey's commitment to MSH was subject to the procedural requirements of § 46-14-221.

Alternatively, this Court may determine the district court committed Mullarkey to MSH under § 46-14-202. The district court's order required that the sheriff transfer Mullarkey to MSH for the purpose of a competency evaluation, rather than a commitment to regain fitness. (Appellant's Ex. A at 2.) In committing Mullarkey to MSH, the district court did not rely upon a competency evaluation, as required by § 46-14-221(1). Dr. Gregg's report failed to include an opinion of Mullarkey's fitness to proceed and, therefore, did not satisfy the requirements of a "Report of Examination" under § 46-14-206(1)(c). *See* Mont.

Code Ann. § 46-14-221(1). Also, the district court did not determine that Mullarkey was unfit to proceed prior to his commitment at MSH. (Appellant's Ex. A at 4.) Finally, MSH produced a competency evaluation of Mullarkey in accordance with § 46-14-202. Accordingly, this Court may determine that Mullarkey's commitment to MSH was subject to the procedural requirements of § 46-14-202.

Whichever the Court may determine, the result remains the same. The district court substantially violated the procedural requirements of both §§ 46-14-202 and -221. In regard to § 46-14-221, the district court violated the requirements of Montana's commitment procedure in three ways.

First, the district court held Mullarkey at MSH beyond ninety days without review of his fitness to proceed. The district court committed Mullarkey to MSH on July 25, 2008, but failed to provide the fitness review hearing *within* ninety days of that date as required by § 46-14-221(3)(a). Mullarkey did not receive a fitness review hearing until November 5, 2008, one-hundred, three days after the district court first committed him to MSH.

Second, the district court failed to determine Mullarkey was unfit to proceed before committing him to MSH under § 46-14-221. Mullarkey was subject to an individualized treatment plan for over ninety days, designed by MSH to assist him in regaining fitness to proceed. This treatment plan was developed in violation of

§ 46-14-221(2), which required the district court first determine Mullarkey unfit to proceed.

Third, the district court failed to obtain a report of examination, or competency evaluation, as required by Mont. Code Ann. § 46-14-221(1). Dr. Gregg's report to the district court did not include an opinion regarding Mullarkey's fitness to proceed and, therefore, failed to satisfy the requirements of § 46-14-206(1)(c). The district court was required to obtain such a report before it committed Mullarkey to MSH under § 46-14-221(1).

In regard to § 46-14-202, the district court violated procedural requirements in two ways. First, the district court detained Mullarkey at MSH far longer than sixty days, which is the maximum period allowed under § 46-14-202. Second, the district court failed to make any determination that Mullarkey's detention at MSH for one-hundred, three days was necessary for the purpose of the competency evaluation.

The district court's five violations of Montana's commitment procedures require that this Court dismiss the State's charges against Mullarkey with prejudice. The district court's failure to comply with the requirements of Montana's commitment procedures constituted a jurisdictional error that must void the prior proceedings *ab initio* upon reversal. See *Giddings I*, ¶ 19; *Finley*, ¶ 13; *Walker*, ¶ 19. The district court's commitment of Mullarkey to MSH in violation

of Montana's procedural requirements constituted a violation of his constitutional due process guarantees. *See Morissey*, 408 U.S. at 480; *Tison*, ¶ 11. Therefore, this Court must reverse the district court's sentence and dismiss the State's charges with prejudice.

## **II. THE DISTRICT COURT IMPROPERLY DENIED MULLARKEY'S MOTION TO DISMISS.**

The district court erred in its denial of Mullarkey's motion to dismiss. Mullarkey argued that the district court was required to dismiss the State's charges against him for violation of his constitutional due process guarantees and violation of the commitment procedures required under Montana law. As argued above, such violations require dismissal. Therefore, the district court should have granted Mullarkey's motion to dismiss. This Court should reverse the district court's order denying Mullarkey's motion to dismiss and dismiss the State's charges against Mullarkey with prejudice.

The district court's denial of Mullarkey's motion to dismiss failed to address Mullarkey's argument. Mullarkey argued that his constitutional due process guarantees were violated through the district court's failure to comply with the statutorily required time limits of Montana's commitment proceeding under Mont. Code Ann. § 46-14-202(2). The district court held Mullarky at MSH beyond sixty days with no determination the longer period of one-hundred, three days was necessary for the purpose of his competency evaluation. Accordingly, Mullarkey

argued that the district court, thereby, violated his constitutional due process guarantees.

The district court determined that *Tison* failed to provide authority for Mullarkey's motion to dismiss. This Court determined in *Tison* that, at a minimum, due process requires a rational relation between the nature and duration of commitment and its purpose. *Tison*, ¶ 11 (citing *Jackson*, 406 U.S. at 738). The requirements of commitment procedures under Montana statute are "clearly designed to prevent the abhorrent situation where a defendant languishes indefinitely in a mental hospital with criminal charges hanging over his head like the sword of Damocles." *Tison*, ¶ 11.

The district court committed Mullarkey to MSH on July 25, 2008, and failed to review his commitment until November 5, 2008, one-hundred, three days later. At no point during this period did the district court determine a longer period than sixty days was necessary. Under both *Tison* and Mont. Code Ann. § 46-14-202(2), due process required that the district court do so.

Consequently, the district court's interpretation of *Tison* was incorrect. Under *Tison*, the district court was obligated to determine whether a rational relation existed between the period of Mullarkey's commitment and its purpose. The district court's denial of Mullarkey's motion to dismiss was improper. The district court failed to establish that Mullarkey's excessive commitment was

necessary. As a result, the district court violated Mullarkey's constitutional due process guarantees. Therefore, this Court should dismiss the State's charges against Mullarkey with prejudice.

**III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DETERMINED THAT MULLARKEY WAS FIT TO PROCEED AND, THEREFORE, THIS COURT MUST DISMISS THE CHARGES AGAINST MULLARKEY UNDER MONT. CODE ANN. § 46-14-221(3)(a).**

The district court's determination Mullarkey was fit to proceed constituted an abuse of discretion. Mullarkey's testimony did not constitute substantial evidence that a reasonable trier of fact could rely upon to determine Mullarkey was fit to proceed. The district court improperly relied upon the testimony of a diagnosed paranoid schizophrenic in complete denial of his mental illness. Likewise, the district court improperly disregarded the testimony of Dr. Hill and Dr. Van Hassel who indicated that Mullarkey was unable to assist in his own defense.

Although largely within its discretion, the district court's determination that a criminal defendant is fit to proceed must be supported by substantial evidence. *Statezar*, 228 Mont. at 456, 743 P.2d at 613. A district court abuses its discretion when a reasonable trier of fact could not rely upon the evidence to support a conclusion that a criminal defendant is fit to proceed. *Statezar*, 228 Mont. at 456,

743 P.2d at 613 (*citing State v. Hall*, 203 Mont. 528, 533, 662 P.2d 1306, 1308 (1983)).

This Court has adopted the following definition of fitness to proceed: “The test [is] whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him.” *State v. Austad*, 197 Mont. 70, 78, 641 P.2d 1373, 1378 (1981) (*citing Dusky v. United States*, 362 U.S. 402, 403 (1960)). Furthermore, Montana statute provides:

A person who, as a result of mental disease or defect or developmental disability, is unable to understand the proceedings against the person or to assist in the person’s own defense may not be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures.

Mont. Code Ann. § 46-14-103 (2009). Accordingly, the district court’s determination that a criminal defendant is fit to proceed must be supported by substantial evidence that the defendant is able to (a) understand the proceedings against him, (b) assist in his own defense, and (c) consult with his lawyer with a reasonable degree of rational and factual understanding. *See* Mont. Code Ann. § 46-14-103; *Austad*, 197 Mont. at 78, 641 P.2d at 1378.

In *Statczar*, this Court upheld the District court’s determination Statczar was fit to proceed despite conflicting evidence in regard to his competency. *Statczar*, 228 Mont. at 456, 743 P.2d at 613. At a second competency hearing, the State



presented testimonial evidence from Dr. Stratford that Statczar was fit to proceed. In opposition, Statczar presented testimonial evidence from Dr. Xanthopoulos, Dr. Hamlin, and his court-appointed attorney that he suffered from a serious brain injury and, consequently, was unable to understand the judicial proceedings. Consequently, the State and defendant presented the district court with conflicting reports from expert witnesses in regard to Statczar's fitness to proceed. This Court determined that substantial evidence supported the district court's determination that Statczar's was competent to stand trial. The State had presented testimony from Dr. Stratford, a mental health expert, which constituted substantial evidence in support of the district court's determination that Statczar was fit to proceed. *Statczar*, 228 Mont. at 456, 743 P.2d at 613.

The present case must be distinguished from *Statczar*. In *Statczar*, the District court's determination could not possibly constitute an abuse of discretion. The district court had to decide whether Statczar was fit or unfit to stand trial. Both determinations could be supported by the testimony of qualified mental health experts. Consequently, the district court's determination would be supported by substantial evidence no matter how it was decided.

In the present case, the district court's determination that Mullarkey was fit to proceed flew against substantial evidence to the contrary. Similar to the district court in *Statczar*, the district court in this case was presented with conflicting

evidence. Mullarkey testified that he was fit to proceed, while Dr. Hill testified that Mullarkey was not fit to proceed. Dr. Van Hassel joined Dr. Hill in the MSH report. Dr. Hill and Dr. Van Hassel were qualified mental health experts, while Mullarkey was diagnosed by MSH as a paranoid schizophrenic in complete denial of his mental illness. A reasonable trier of fact could not rely upon the testimony of Mullarkey to determine that he was fit to proceed. Consequently, the district court's determination Mullarkey was fit to proceed constituted an abuse of discretion.

Dr. Hill and Dr. Van Hassel's report to the district court indicated the only possibility Mullarkey could regain fitness would be through a district court order granting MSH authority to involuntarily medicate him. (Appellant's Ex. C at 7:5.) Yet the district court could not legally authorize that order. This Court has determined that a criminal defendant cannot be involuntarily medicated under Mont. Code Ann. § 46-14-221. *Curtis*, 266 Mont. at 237, 879 P.2d at 1167. In effect, Dr. Hill testified that Mullarkey could not regain fitness to proceed in the reasonably foreseeable future.

Accordingly, the district court disregarded testimonial evidence provided by a qualified mental health expert, Dr. Hill, that required dismissal of the State's charges against Mullarkey under § 46-14-221(3)(a). To disregard this evidence, the district court relied upon Mullarkey's own testimony to determine he was able

to assist in his own defense and consult with counsel with a reasonable degree of rational and factual understanding. Both Dr. Hill and Dr. Van Hassel reported to the district court that Mullarkey was a diagnosed paranoid schizophrenic in complete denial of his mental illness. As such, Mullarkey's testimony did not constitute "substantial evidence" that a reasonable trier of fact could rely upon to conclude Mullarkey was fit to proceed.

The district court's determination Mullarkey was fit to proceed constituted an abuse of discretion. Mullarkey was neither fit to proceed nor was he likely to regain fitness within the reasonably foreseeable future. Consequently, the district court should have dismissed the State's charges against Mullarkey under Mont. Code Ann. § 46-14-221(3)(a). This Court must reverse the district court's determination for abuse of discretion and dismiss the State's charges against Mullarkey with prejudice.

**IV. THE DISTRICT COURT FAILED ITS DUTY TO EVALUATE MULLARKEY'S FITNESS FOR PENAL PUNISHMENT AND, THEREFORE, THIS COURT MUST REMAND FOR RE-SENTENCING.**

At sentencing, the district court failed to evaluate Mullarkey's fitness for penal punishment. Courts have a continuing duty to review the issue of competency in criminal proceedings. *State v. Bartlett*, 271 Mont. 429, 898 P.2d 98 (1995). This Court has determined that a sentencing judge has a duty to evaluate the defendant's mental condition independent from the requisite mental state

element of a crime. Thereby, the “problems of cruel and unusual punishment of the insane are to be avoided.” *State v. Korell*, 213 Mont. 316, 338-39, 690 P.2d 992, 1004 (1984).

Under Mont. Code Ann. §§ 46-14-311 and -312(2), the sentencing judge must consider whether the defendant suffered from a mental disease or defect at the time of the commission of the offense. Specifically, the sentencing judge must determine whether the defendant’s mental disease or defect rendered him unable to appreciate the criminality of his behavior or to conform his behavior to the requirements of the law. *See* Mont. Code Ann. § 46-14-311(1) (2009).

To effect this determination, the sentencing judge must order a pre-sentence investigation that includes an opinion by a person appointed through the department of public health and human services (DPHHS) as to whether the defendant’s mental illness or defect had the effect described in § 46-14-311(1). Mont. Code Ann. § 46-14-311(2). If the sentencing judge determines the defendant “suffered from a mental disease or defect or developmental disability as described in 46-14-311, any mandatory minimum sentence prescribed by law for the offense need not apply.” Mont. Code Ann. § 46-14-312(2).

Finally, the sentencing judge “shall sentence the defendant to be committed to the custody of the director of the department of public health and human services.” Mont. Code Ann. § 46-14-312(2). In *Korell*, this Court stated, “[i]f

problems of cruel and unusual punishment of the insane are to be avoided, the sentencing judge must faithfully discharge the review duties of Sections 46-14-311 and 46-14-312, MCA.” *Korell*, 213 Mont. at 338-39, 690 P.2d at 1004.

In *Korell*, this Court stated that the District court’s refusal to consider the defendant’s mental illness at sentencing “flies in the face of the court’s basic duty to independently evaluate the defendant’s mental condition.” *Korell*, 213 Mont. at 338, 690 P.2d at 1004. “[W]henEVER mental disease or defect is put in issue, the [sentencing judge] must review the defendant’s mental condition prior to sentencing.” *Korell*, 213 Mont. at 338, 690 P.2d at 1004. The sentencing court must not defer this duty to the jury. “The fact that a jury has found the existence of a requisite mental state does not conclusively establish the defendant’s sanity or fitness for penal punishment.” *Korell*, 213 Mont. at 338, 690 P.2d at 1004. Accordingly, “[t]hat determination must be independently made by the sentencing judge and the record *must* reflect the deliberative process.” *Korell*, 213 Mont. at 338-39, 690 P.2d at 1004 (emphasis added). Where the record fails to reflect such deliberative process, this Court is compelled to vacate the sentence and remand for resentencing. *Korell*, 213 Mont. at 338, 690 P.2d at 1004.

In the present case, the record includes no indication the district court fulfilled its duty to evaluate Mullarkey’s mental illness at sentencing. The district court failed to direct the pre-sentence investigator to include in the pre-sentence

report an opinion from DPHHS, as required by § 46-14-311(2). Accordingly, the pre-sentence report failed to analyze the effect of Mullarkey's paranoid schizophrenia upon his commission of his offenses. Additionally, the district court failed to make any record-based analysis of the effect of Mullarkey's diagnosed paranoid schizophrenia upon his ability to appreciate the criminality of his behavior or conform his behavior to the requirements of the law at the time he committed his offenses. The district court failed its duty to analyze Mullarkey's fitness for penal punishment. If dismissal proves inapplicable, this Court must remand this matter for re-sentencing.

### **CONCLUSION**


This Court must dismiss the State's charges against Mullarkey with prejudice. The district court's failure to comply with the requirements of Montana's commitment procedures violated Mullarkey's constitutional due process guarantees. Additionally, the district court's violations of Montana's commitment procedures divested the court's jurisdiction over the State's charges against Mullarkey. Accordingly, the district court improperly denied Mullarkey's motion to dismiss. Furthermore, the district court's determination Mullarkey was fit to proceed constituted an abuse of discretion. Mullarkey was not fit to proceed and was not likely to regain fitness within the reasonably foreseeable future.

Consequently, this Court must dismiss the State's charges against Mullarkey under Mont. Code Ann. § 46-14-221(3)(a).

Even if the State's charge against Mullarkey may not be dismissed, this Court must remand this matter for re-sentencing. At sentencing, the district court failed its duty to analyze the effect of Mullarkey's mental illness upon his fitness for penal punishment.

Respectfully submitted this 21<sup>st</sup> day of March, 2010.

OFFICE OF THE STATE PUBLIC DEFENDER  
Region 2 – Missoula  
610 North Woody  
Missoula, MT 59802

By:   
ELI M. PARKER  
Assistant Public Defender

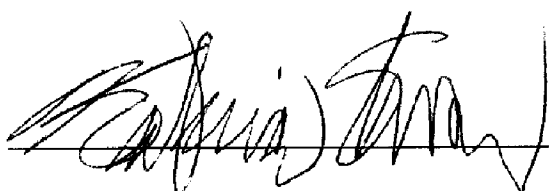
**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing Brief  
of Appellant to be mailed to:

STEVE BULLOCK  
Montana Attorney General  
MARK MATTIOLI  
Assistant Attorney General  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401

LEO J. GALLAGHER  
Lewis and Clark County Attorney  
228 Broadway-Courthouse  
Helena, MT 59601


NIEL MULLARKEY  
942 North Fee Street  
Helena, MT 59601

DATED: 5/26/10 



## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

  
\_\_\_\_\_  
ELI M. PARKER